Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In the Matter of | ) | | |
| | ) | | |
| Unbundling of Local Carrier | ) | RM 86-14 | |
| Common Line Facilities | ) | | |

**Comments of Ameritech**



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### I. Introduction and Summary

Ameritech[1] files its Comments on MFS' petition. Although Ameritech strongly supports loop unbundling, it opposes MFS' request that the Commission commence a rulemaking to require Tier 1 local exchange carriers to unbundle their "common line element of interstate access service (the "local loop")[2] for four reasons:

- The local loop is an integral part of local exchange service that is subject to the jurisdiction of the states;
- The states are currently addressing the issue of local unbundling in the broader context of the institution of local exchange competition;
- Federal issues arising from local loop unbundling are already being addressed by the Commission;
- A Commission mandate to unbundle the local loop raises serious constitutional questions, and is not compelled by the antitrust laws.

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[1] Ameritech means: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[2] MFS Petition 1.

Most of the issues raised by MFS are within the jurisdiction of the states and are currently being addressed by the states. MFS is seeking to bypass the state commissions. Ameritech agrees with MFS that unbundling of the local loop is in the public interest[3] and should proceed expeditiously in the states where appropriate local regulatory reforms are implemented. As is correctly recognized by MFS, one of the necessary reforms is increased LEC pricing flexibility.[4] Such pricing flexibility should not, as is suggested by MFS, be limited to the CCL charges. Another necessary reform is the granting of interLATA relief for Ameritech so it can compete on an equal footing with its competitors.

All of the Ameritech states are making significant progress on the introduction of local competition and on the resolution of the many interrelated local issues arising from the introduction of local competition, including loop unbundling. Ameritech is implementing local loop unbundling in Illinois and Michigan. There is no need for the Commission to become involved in that process through a rulemaking. In fact, a rulemaking may cause confusion, delays and conflicts that will hinder progress.

Ameritech will demonstrate that because the pricing of local loops is based upon local circumstances, the Commission should resist MFS' proposal

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[3] However, Ameritech disagrees with MFS that local loop unbundling should be limited to just Tier 1 LECs. Since loop unbundling is in the public interest, all carriers offering local exchange service should unbundle.

[4] MFS Petition 48-50. See, In the Matter of a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, DA 93-481 ("Customers First"). Attachment 3 of 4 of April 19, 1993 Supplemental Material.

that it create alleged "voluntary" guidelines for pricing unbundled local loops. In addition, Ameritech will demonstrate that MFS' proposed cost methodology is flawed because it ignores the recovery of joint and common costs in violation of the Commission's long established cost principles; and applies an incorrect imputation analysis.[5]

The federal issues related to the unbundling of local loops, such as recovery of the end user common line (EUCL) and carrier common line (CCL), appropriate interconnection arrangements for unbundled loops and access pricing flexibility, are being addressed at this time.

Further, Ameritech will demonstrate that the current offering of basic local exchange service is not an antitrust violation. To the contrary, the antitrust laws do not require the unbundling of exchange service. The courts applying the antitrust laws properly defer to state regulatory policies. Moreover, there is simply no requirement under the antitrust laws that LECs must enable competitors to pick and choose components of LECs' networks that they wish to utilize.

Any mandate that a LEC provide unbundled loops to its competitors may also raise serious constitutional questions. Forcing a LEC to dedicate its physical plant for the exclusive use of a competitor may constitute confiscation of property under the Just Compensation clause of the Fifth Amendment to the U.S. Constitution.[6]

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[5] MFS Petition at 46-49.

[6] See, Bell Atlantic v. FCC (D.C. Cir. 1994) 24 F.3rd 1441.

## II. Role of the States in Local Competition

MFS requests that the Commission take the drastic step of preemptively declaring the unbundling of local exchange services to somehow be a federal issue. In doing so, MFS would have this Commission ignore the fact that the exchange services at issue have historically been regulated by the states as intrastate services. State regulators are now actively involved in making decisions relating to the unbundling of local exchange services in connection with their own development of public policy and unique circumstances regarding local exchange competition. Ameritech submits that MFS has failed to present any justification or a legitimate policy basis for its request.

MFS has it backward -- unbundling of the local loop is not an access issue, it is a local issue. The service that MFS seeks to unbundle is today part of local exchange service; in fact, MFS admits it will use the local loop to provide local exchange service.[7]

The Communications Act, in relevant part, provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications service by wire or radio of any carrier..." (47 USC §152(b))[8] Contrary to MFS'

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[7] MFS Petition at 3-9.

[8] MFS has not claimed that the Commission should assert jurisdiction over unbundling based on any of the exceptions to this section, i.e., Sections 223, 224 and 225, 301, or Subchapter V-A.

implication the courts have recognized that even when equipment or facilities are used separably and interchangeably for intrastate and interstate calling, the Commission is required to limit its regulation to interstate aspects of the service if it can do so.[9] Thus, there is a significant question regarding the nature and extent of the Commission's jurisdiction to set policy regarding local exchange service.

The unbundling of local loops also raises a broad array of issues that are primarily and fundamentally local in nature, and are more appropriately left to the states. MFS argues that in order for viable local exchange competition to occur, it must have the ability to purchase unbundled loops because it cannot economically be expected to build its own loop facilities. The consideration of this assertion is inextricably tied up with specific local issues such as whether the form of local exchange competition is in the state's public interest; the relative cost of duplicating facilities and the extent of competitors' existing plant; the application of unbundling to all carriers; the definition and pricing of unbundled components; the extent to which further unbundling of subelements may be considered; how competitors will be regulated in connection with their provision of local exchange service; the need to rebalance other local rates; and the implication of carrier of last resort and universal service issues.

[9] Public Utility Commission of Texas v FCC (D.C. Cir., 1989); 886 F.2d 1325. *See also* Louisiana Public Service Commission v FCC, (1986), 106 S.Ct. 1890; 476 U.S. 355; 90 L.Ed 2d 369.

The states are actively involved in addressing all these issues. For example, in the Ameritech region, all of the state regulatory commissions currently have one or more proceedings underway to consider issues related to local competition. In Michigan, competing providers are offering service. Last week, an order was entered in an Illinois proceeding addressing local competition, including loop unbundling. The following summarizes the status of local competition issues in the Ameritech region:

Michigan -- In Michigan Public Service Commission (MPSC) Case No. U-10647, the MPSC has ordered Ameritech Michigan to provide competing local exchange providers with unbundled local loops on an interim basis. There are currently two competing providers of basic local exchange service licensed in Michigan (City Signal and MCI Metro), and two applications pending which are likely to be approved in the near future (MFS and Teleport). A subsequent proceeding to consider longer term local competition issues, including the pricing of unbundled loops, is scheduled to begin in June of this year.

Illinois -- The Illinois Commerce Commission (ICC), in Dockets 94-0096, 94-0117, 94-0146, 94-0301, approved Ameritech Illinois's proposal to offer unbundled loops to local exchange competitors. The ICC will conduct further proceedings to consider local competition issues. In addition to numerous resellers operating in the state, there are two facilities-based local exchange competitors currently certified in Illinois (MFS and Teleport) and MCI Metro's application is pending.

Ohio -- The Public Utilities Commission of Ohio (PUCO) has instituted workshops to consider local exchange competition issues, commencing on April 10, 1995. Time Warner and MFS have pending applications for certification as local exchange providers.

Indiana -- The Indiana Utility Regulatory Commission (IURC) has instituted a generic docket (No. 39983) to consider issues relating to local exchange competition. Requests for certification as a local exchange competitor are pending on behalf of MCI and Hancock Rural Telephone Company.

Wisconsin -- The Public Service Commission of Wisconsin (PSCW) has instituted a docket (No. 1-AC-144) to address local exchange competition issues.

Although its petition urges this Commission to step in and assume national responsibility for local exchange service unbundling, MFS' most recent public pronouncements recognize that issues relating to local competition are being effectively addressed in the states, apparently to MFS' satisfaction. In its March 31, 1995 press release announcing further acceleration of its growth plans, MFS discussed the favorable climate for its business operations:

> "NEW BUSINESS OPPORTUNITIES In the United States, the Company has now achieved the essential elements of regulatory parity with former local phone monopolies in Illinois, Maryland, Michigan and New York, a standing often referred to as "co-carrier" status. Additionally, California, Connecticut, Iowa, Massachusetts, New Jersey, Ohio, Oregon, Pennsylvania, Texas, and Washington have all initiated proceedings involving granting co-carrier status to competitors.
>
> James Q. Crowe, chairman and chief executive officer, stated that: 'Co-carrier status **is becoming a reality much faster than we envisioned even one year ago.** We are moving quickly to capitalize on this opportunity to provide high quality, cost-effective local telephone service to our business customers'" (emphasis added)

In its petition, MFS cites the views expressed by Anne K. Bingaman, Assistant Attorney General for Antitrust, U.S. Department of Justice, in support of the proposition that unbundling will enhance competition in the local exchange marketplace.[10] However, Ms. Bingaman has also expressly recognized the respective roles of the states and the FCC. In discussing competition in the provision of dial tone service, i.e. local exchange competition, Ms. Bingaman referred to the efforts of states such as Michigan, Illinois, New York, Maryland and California; "We applaud these states and urge other states to follow that lead".[11] Recognizing that local exchange service is a complex market with complex relationships between incumbent

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[10] MFS Petition at 14.

[11] *See* "Promoting Competition in Telecommunications" Address by Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the National Press Club, Washington, D.C., February 28, 1995, at 9.

LEC's and the new competitors, Ms. Bingaman noted that "... the states I have mentioned want competition in local markets and they are working to find ways to achieve it without threatening other reasonable public policy goals. I cannot overstate the importance of these state's efforts to promote local competition."[12] Thus, the Department of Justice recognizes the significant role of the states in the development of local exchange competition.

## III. Federal Issues Related to Unbundling

The federal issues related to local loop unbundling are already being addressed by the Commission. For example, if unbundling is implemented, competitors will need to interconnect with the incumbent LEC's facilities. In the case of unbundled loops, which are typically defined as the transmission path from the demarcation point at the customer's premises to the main distribution frame in the serving wire center (SWC), a method must be available to connect this facility to the competitor's switch. As is acknowledged by MFS, the interconnection arrangements necessary for this purpose have already been developed by this Commission.[13] Switched and special access interconnection services, using collocation arrangements, are available today in Ameritech's tariffs and effectively meet the interconnection needs for local loops.

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[12] Id. at 10; See also, id. at 17 "The Department of Justice would not seek to supplant the state regulators or the FCC; they are the experts in telephone regulation. We depend upon and work closely with the states and with the FCC. In fact, this approach, if adopted, depends upon the states' acting first to encourage competition, . . . ."

[13] MFS Petition at 36, 50.

The purchase of local loops by competitors may also involve questions of appropriate application of interstate charges, such as the EUCL charge or CCL rate element. These issues are being addressed by this Commission on a case-by-case basis, giving due consideration to the unique circumstances of local competition as it has developed in the states.[14]

Furthermore, in Michigan and Illinois, where local loop unbundling is being implemented, issues of the appropriate application of the EUCL and CCL may not need to be addressed by this Commission. In Illinois, unbundled loop rates will apply net of the EUCL; i.e. if a customer pays the EUCL on an unbundled loop, the intrastate unbundled loop rate will be reduced via a credit, so the customer pays no more in total, whether or not a EUCL is charged. A similar pricing structure has been implemented on an interim basis in Michigan. At this time, no general FCC rulemaking is necessary.

One of the consequences of increasing competition for local exchange services which will have ramifications in the federal jurisdiction is the necessity for greater pricing flexibility for access services, both intrastate and interstate. As new local exchange carriers enter into competition with incumbent LECs in the local exchange marketplace, they will also be competing with the LECs in the provision of access services. MFS recognizes in its petition that the development of competition will result in a need for

[14] In the Matter of Rochester Telephone Corporation Petition to Implement its Open Market Plan, Order released March 7, 1995.

greater pricing flexibility.[15] Obviously, the Commission should continue to develop pricing flexibility for interstate services where competition exists. However, maintaining this role does not require this Commission to step preemptively into the intrastate jurisdiction and assume responsibility for intrastate services.

Rather, the Commission should approve waiver requests like the ones proposed by Ameritech and NYNEX that provide needed pricing flexibility where local loop unbundling has occurred.[16] The Commission also should implement the competitively neutral recovery of subsidies proposed by Ameritech in its Customers First filing while it considers a longer-term solution to the issue of uneconomic costs and subsidies built into access rates.

## IV. Technical Issues

Like the pricing issues, the technical issues relating to unbundled loops do not justify intervention by the Commission. MFS requests that the "Commission can, and should, assert its jurisdiction to adopt uniform technical standards for interconnection to unbundled loop facilities, including consistent definitions of unbundled loop functionalities."[17] A rulemaking on the technical aspects of interconnection is not necessary. Current standard interfaces have proven to be technically efficient and meet the needs of the industry regarding unbundled loops.

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[15] MFS Petition at 49.

[16] Ameritech's Customers First Plan waiver request, DA 93-481, *supra;* NYNEX Transition Plan to Preserve Universal Service in Competitive Environment, 93-1537.

[17] MFS Petition at 30.

It also is not necessary for the Commission to "promulgate uniform ordering and installation procedures".[18] The current process for ordering interconnection is via the Access Service Request (ASR). The ASR is nationally maintained through voluntary participation in the Ordering and Billing Forum (OBF) and any duplication of that industry process would be wasteful and unnecessary.

An additional technical issue is raised by MFS when it suggests that "the preferred provisioning method would be the installation of a dedicated multiplexer for use(d) by competitive local exchange carriers."[19] The manner in which Ameritech or any other telecommunications provider chooses to provision its network should not be determined by any other party. The selection of network design or specific equipment is a decision of the service provider based upon then-current circumstances. For example, in a situation where a carrier could request only a single loop, it would not be cost effective, nor technically efficient, to dedicate a multiplexer to that carrier's use. The method by which unbundled loops are provided or where pair gain devices are employed is an internal business decision based upon many factors including the needs of the network as a whole. Ameritech does not presume to micro-manage the design of MFS' local distribution network and MFS should not attempt micro-manage Ameritech's network.

[18] MFS Petition at 42.
[19] MFS Petition at 42.

## V. Proposed "Voluntary" Pricing Standards

As previously discussed, the pricing of unbundled loops, as well as the definition of the service and the requirement that local exchange service be unbundled for use in local exchange competition, are issues properly to be considered by the states. MFS has articulated no legal or policy rationale upon which this Commission can or should establish "voluntary" pricing guidelines for the states. However, lest the assertions made in the petition be deemed unrebutted, Ameritech is compelled to point out that MFS' proposed "voluntary" guidelines are flawed.

MFS argues that the LECs' Total Service Long Run Incremental Costs ("TSLRIC") should be the price for unbundled loops. To the contrary, an incremental cost standard such as TSLRIC is not a proper measure for applying a "cap" to the pricing of a regulated service. Incremental cost is well understood in economics as a measure of the price **floor** for a product or service provided in a competitive market. There is no justification for the imposition of a price **cap** at incremental cost for a product or service provided by one company to its competitor. MFS has made no attempt to provide any such justification.

The existence and importance of joint and common costs has long been recognized in the telecommunications industry, and from the inception of access rates, such costs have been reflected in the prices of access services.[20]

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[20] See, e.g. Part 69 of the Commission's Rules, Subsections B, C, D and E. 47 CFR §69.

MFS's voluntary pricing proposals, using only incremental costs, would ignore these principles.

MFS also offers an "imputation standard" as an alternative to its so-called "cost-based pricing" standard. This "imputation standard" is based on an array of assertions by MFS that are not consistent with sound economics. The issue of imputation is addressed in state statutes and regulatory rules, and need not be addressed by this Commission.[21]

## VI. Antitrust Claims

There is no merit to MFS's assertion that LECs commit an antitrust violation by "bundling" loop and port services. MFS cannot cast aside 75 years of regulatory policy with the glib assertion that those policies all of a sudden violate the antitrust laws. MFS again has it backwards; state regulatory policy does not defer to the antitrust laws, but rather the antitrust laws defer to state regulatory policy.[22] The unbundling debate should be driven by sound public interest considerations, not unfounded antitrust claims.

As the Commission is well aware, today LECs offer an undivided product: local exchange service. State regulatory commissions are now in the process of determining whether, and to what extent, this integrated service

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[21] See for example Section 13-501.1 of Illinois Public Utilities Act; Section 311 of the Michigan Telecommunications Act, MCL § 484.23; and Section 103 of the 1993 Wisconsin Act 496, 196.204(6)(a)(b)(c)(d), Wis. Stat. 1993-94.

[22] California Retail Liquor Dealers Assn. v Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). See DFW Metro Line Services v Southwestern Bell Tel. Corp., 988 F.2d 601 (5th Cir. 1993) (applying the state action doctrine where the state's public utility act expressed a state policy of regulation and the commission closely monitored the local exchange carrier).

should be fragmented into its components, including loops and ports. However, until the industry standard becomes the offering of two distinct products, any antitrust doctrines governing "tying arrangements" are simply inapplicable and should not be a consideration in the Commission's deliberations.

The Supreme Court has made clear that "a tying arrangement cannot exist unless two separate product markets have been linked"; for that to occur, there must be "two separate products that may be tied together."[23] Whether or not products are distinct depends in large part on the "actual practice" in the industry, that is, whether the products are "separately priced and purchased, " and whether customers routinely differentiate between the two products or instead consider them part of a single purchase. Hyde, 466 U.S. 20-23 & n.36.[24] Given that today local exchange service is still almost universally offered by LECs on an undivided basis, MFS has no valid tying claim.[25]

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[23] Jefferson Parish Hospital v Hyde, 466 U.S. 2, 18, 21 (1994). Accord Eastman Kodak Co. v Image Technical Services, 112 S. Ct. 2072, 2079-2080 (1992) (tying law requires "different" and "distinct" products).

[24] See also Kodak, 112 S. Ct. at 2080 (remanding for further consideration where products "have been sold separately in the past and still are sold separately').

[25] See, e.g., Times-Picayune Pub. Co. v United States, 345 U.S. 594, 613-614 (1953), holding that advertising space in two periodicals did not constitute separate "products" even though some customers "consciously distinguished between these two publications"; the "common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity." See also Jack Walters & Sons Corp. v Morton Bldg., Inc., 737 F.2d 698, 702-705 (7th Cir. 1984), finding that an integrated product could not support "tying" claims, and observing that to hold "every composite product is a tie-in, subject to the hostile scrutiny to which antitrust law still subjects tie-in, subject to the hostile scrutiny to which antitrust loud, and has been rejected. *** It is enough (to prevent application of the antitrust laws) if the end product is a single product."

Simply because MFS desires LECs to unbundle integrated exchange service does not mean that the failure to do so violates the antitrust laws. The antitrust laws do not require LECs to break apart their integrated exchange service into fragments at the whim of would-be competitors. "Courts have generally rejected the notion that consumers" --much less resellers --" can force sellers to package an integrated product into a kit of individual components."[26] MFS has not offered a shred of support for its conclusory assertion that a "port" (as defined by it) is a product distinct from "loops" for purposes of antitrust analysis.[27]

These principles apply fully to telephone companies. See, Illinois Bell Tel. Co. v Haines & Co.,[28] which held that a phone company's requirement that publishers purchase both desired and undesired directory listings was not an illegal tie-in because the sales were not made up of "separate and distinct products".

Although not directly raised by MFS, the essential facilities doctrine provides further support for the proposition LECs are not required by the antitrust laws to make unbundled loops available to MFS. The essential facilities doctrine states that under certain circumstances the owner of an essential facility may be required to provide reasonable access to that facility to a competitor. However, even the provider of what is alleged to be an

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[26] See Servicetrends, Inc. v Siemens Medical Systems, Inc., 1995-1 Trade Cas. ¶ (CCH) 70,901, at 74,005 n.2 (N.D. Ga. June 24, 1994).

[27] See, Telerate Sys. v Cargo, 689 F. Supp. 221, 235, 236 (S.D.N.Y. 1988) in which the court found no evidence that terminals used to gain access to financial data were separate and distinct from access to the database itself.

essential facility need not make that facility available to a competitor where the competitor is in the business of building precisely the same sort of facility.[29] Here, since MFS will be a facility-based provider of local exchange services, there is no reason why it cannot construct its own loops.

## VII. CONCLUSION

The transition to full and fair competition in all aspects of the telecommunications industry is of necessity a multi-jurisdictional effort, involving the Commission, the state commissions, the Department of Justice, the federal courts, and possibly Congress. Ameritech made this point in its initial submission of the Customers First Plan over two years ago. There is

[28] 905 F.2d 1081, 1088 (7th Cir. 1990) vacated and remanded on unrelated copyright grounds, 499 U.S. 944 (1991).

[29] See, MCI Communications v. AT&T, 708 F.2d 1081, 1147-48 (7th Circuit 1983), *cert. denied* 464 US 891.

no legal or policy basis for the Commission at this time to take the drastic step of preempting the role of the state regulatory commissions with regard to the unbundling of local exchange service. For all the reasons stated, Ameritech requests that the Commission decline to institute a rulemaking as proposed by MFS.

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